IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16..4..2007

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THE HONOURABLE MR. JUSTICE K. CHANDRU

Writ Petition Nos.9249 of 2004,
37756 of 2006 and 1469 of 2007

W.P.No.9249 of 2004:

Durai Ezhilan .. Petitioner

Vs.

1. Aruna Sugars Higher Secondary School
rep. by its Secretary
Eraiyur
Pennadam
Cuddalore District

2. The Joint Director of Higher Secondary Education
DPI Campus
College Road
Chennai

3. The Chief Educational Officer
Cuddalore District .. Respondents

Petition filed under Article 226 of the Constitution of India for issuance of writ of Certiorarified Mandamus calling for the records of the first respondent in the order ந,க, எண் செ/த ஆ/36/2003-2004 dated 13.3.2004 and quash the same and to direct the respondents to forthwith reinstate the petitioner as Headmaster of Aruna Sugars Higher Secondary School, Main Road, Eraiyur, Pennadam, Cuddalore District and grant all consequential benefits, arrears, increments and other allowances incidental thereto.

For Petitioner : Mr.AR.L.Sundaresan, SC
for Ms.AL.Ganthimathi

For Respondents 2&3: Mr.P.Gopiraja, GA

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W.P.No.37756 of 2006:

Durai Ezhilan .. Petitioner

Vs.

The District Educational Officer
District Educational Office
Virudhachalam
Cuddalore .. Respondent

Petition filed under Article 226 of the Constitution of India seeking for issuance of writ of Certiorarified Mandamus calling for the records of the respondent in his proceedings Na.Ka.No.7109/Aa3/2006 dated 18.9.2006 quash the same and direct the respondent to pay the entire accrual of the Provident Fund to the petitioner directly without deducting the salary amount of Rs.2,68,515/- as proposed by the respondent.

For Petitioner : Mr.G.Sundaram

For Respondent : Mr.P.Gopiraja, GA

W.P.No.1469 of 2007:

Aruna Higher Secondary School
Rep. by the Secretary
Main Road
Eraiyur
Pennadam
Cuddalore District .. Petitioner

Vs.

1. The Director of School Educational
College Road
Chennai - 6

2. The District Educational Officer
District Education Office
Vridhachalam

3. Durai Ezhilan .. Respondents

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Petition filed under Article 226 of the Constitution of India for issuance of writ of certiorarified Mandamus calling for the records of the second respondent relating to Na.Ka.No.8901/A2/2005 dated 25.01.2006 and quash the same and to direct him to act as per the proceedings of the first respondent dated 17.6.2005 in Na.Ka.No.64003/W8/4 and reimburse the petitioner school.

For Petitioner : Mrs.Hema Sampath, SC
for Mr.R.Subramanian

For Respondents 1&2: Mr.P.Gopiraja, GA

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C O M M O N O R D E R

I have heard the learned counsels appearing for all the parties and have perused the records.

2. In W.P.No.9249 of 2004 and 37756 of 2006, the petitioner is the Headmaster of Aruna Sugars Higher Secondary School, Pennadam. In W.P.No.1469 of 2007, the petitioner is the School Management. Since the subject matter of these three writ petitions is common, all the three writ petitions are grouped together, heard and a common order is passed.

3. For convenience, the parties are referred to as the Headmaster, School Management and the official respondents.

4. The petitioner filed W.P.No.20962 of 2002 and challenged the order of suspension. Though initially stay was granted subsequently, by order dated 12.9.2002, the interim stay was vacated. As against the same, the Headmaster filed writ appeal being W.A. No. 3048 of 2002 and a Division Bench of this Court vide its judgment dated 07.10.2002 held that the order of suspension passed by the Secretary of the School Committee was non-est in law since the Headmaster was placed under suspension as early as 03.6.2002 and since the maximum period of four months have elapsed by the time, the Division Bench heard the matter and directed the School Management to pay the entire salary right from the date of suspension, ie., 03.6.2002 till the date of completion of the enquiry, in lieu of the reinstatement pending disciplinary action and directed the completion of the enquiry and thereafter, the enquiry was conducted and as stated already, the Chief Educational Officer, Cuddalore, refused to grant approval. But as the School Management has not reinstated him, the Headmaster filed W.P. No.11196 of 2003. For the disobedience of the order made in W.P.No.11196 of 2003, a Contempt Petition was filed in C.P.No.489

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of 2006 and the same was dismissed by this Court by an order dated 19.10.2006.

5. In W.P.No. 9249 of 2004, the Headmaster challenges the order of the School Management dated 13.3.2004 wherein and by which he was dismissed from service with immediate effect. According to the School Management, five charges were levelled against the Headmaster and after conducting an enquiry, when proposals were sent to the Chief Educational Officer, Cuddalore, prior approval for the dismissal of the Headmaster was refused by order dated 04.3.2003 and the appeal filed by the School Management was allowed by the appellate authority by order dated 02.3.2004. Against the order of refusal, the School Management filed an appeal before the Joint Director of Higher Secondary Education. In the meantime, the Headmaster filed a writ petition being W.P.No.11196 of 2003 challenging the order of suspension and sought for a direction to the School Management to reinstate him in service as the enquiry was not over. However, this Court vide order dated 28.8.2003 refused to grant restoration of service but stated in paragraphs 4 and 5 as follows:

Para 4: "Taking into consideration of the totality of the circumstances of the case, I am of the view that the petitioner cannot be put in the disputed post till the appeal is disposed of. Hence instead of reinstatement, the first respondent is directed to pay the salary to the petitioner till the appeal is disposed of. If the first respondent ultimately becomes successful in the appeal and the order of termination has been approved by the appellate authority, it is very well open to the first respondent to recover, whatever salary paid to the petitioner from out of the benefits that has been accrued to the petitioner for the service rendered to the first respondent.

Para 5: Learned counsel appearing for the first respondent submitted that appeal is pending before the Joint Director of School Education, Madras who is not a party to the proceedings. It is expected that the Joint Director of School Education, before whom appeal is said to have been filed would dispose of the appeal so as to give quietus to the litigation of the parties at the earliest point of time. The Joint Director of School Education, Madras – 6 is directed to dispose of the appeal within eight weeks from the date of receipt of copy of this order. Till orders are passed the petitioner is entitled to salary as directed by this Court in the earlier writ petition."

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6. The learned Judge pointed out that since the appeal is pending against the refusal to grant approval and if the Headmaster succeeds, he will get the salary towards the interregnum period and the Joint Director, being the appellate authority, was directed to dispose of the appeal within eight weeks from the date of receipt of a copy of the order. Pursuant to the direction, the appellate authority held that the refusal to grant approval by the Chief Educational Officer, Cuddalore, was wrong and, therefore, accepting the appeal filed by the School Management, the appellate authority granted approval by order dated 02.3.2004. Pursuant to the said order, the School Management passed the order dated 13.3.2004 dismissing the Headmaster from service.

7. As against the order of the School Management, the Headmaster has a right of appeal under Section 23 of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 [for short, 'Private Schools Act'] failing which second appeal will lie before the Private Schools Tribunal under Section 24 of the Private Schools Act. The petitioner Headmaster instead of filing an appeal as contemplated under the Act, has come forward to file a writ petition and in the affidavit, he has stated that there is no remedy under the provisions of the Private Schools Act and, therefore, he has filed the present writ petition. This stand of the Headmaster is unacceptable because against the order of dismissal, a right of appeal is granted to a teacher to the Joint Director of School Education and as against the order of the Joint Director, a second appeal is provided for before the Private Schools Tribunal under Section 24 of the said Act.

8. In the present case, if the order of the School Management is construed as a fresh order of dismissal, a right of appeal lies before the first appellate authority. In the present case, the appeal filed by the School Management is only in terms of the appellate authority prescribed under Section 41 of the Private Schools Act read with Rule 29. The order dated 13.3.2004 will have to be taken as only an order passed pursuant to the grant of approval. Therefore, the said order has to be construed as a fresh order of dismissal and hence, there is no impediment for the Headmaster to prefer first appeal under Section 23 of the Private Schools Act within a period of four weeks from the date of receipt of the order and, therefore, if such an appeal is filed, the second respondent Joint Director shall consider the same without reference to any limitation on merits and after giving notice to both parties. The only apprehension can be that in the earlier proceedings, the Joint Director has granted approval and, therefore, he may be biased in dealing with the appeal. Such an apprehension is without any legal basis because while granting approval, the power of the Court is very limited and in a

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regular appeal, the power of the authority is very wide and, therefore, there is still scope for the petitioner to urge before the appellate authority and take a different view. Since already three years have elapsed since the date of order, it is certain that the same appellate authority may not be holding the post. Therefore, the personal bias may not arise.

9. Learned counsel for the Headmaster relied on the decision of the Supreme Court in 2003 (1) CTC 189 [Harbanslal Sahnia and another vs. Indian Oil Corporation Ltd. And others] wherein it has been held that alternative remedy is not a bar for entertaining the writ petition. Since that question does not arise in terms of the Private Schools Act, the exception pointed out by the said judgment does not apply.

10. The second judgment relied on by the learned counsel for the Headmaster is JT 1995 (1) SC 471 [Dr.Bal Krishna Agarwal vs. State of Uttar Pradesh and others] and on the basis of the said judgment, he argued that once the writ petition is admitted and was pending in the High Court, the Court must go into the merits of the case. However, the Supreme Court in respect of the Private Schools Act which sections are in parimateria, held in the decision reported in AIR 1984 (1) SC 158 [S.Jagadeesan vs. Ayya Nadar College and others] that necessarily the parties must follow the provisions of the Act and the Supreme Court directed the School Management to file a proper appeal. Therefore, these two decisions are of no help in the light of the direct judgment under the very same Act.

11. Further, the Supreme Court in more than one case dealing with the provisions of Section 33(2)(b) of the Industrial Disputes Act, 1947 [Provisions relating to grant of approval] has held that the decision under the said provision cannot be a bar in deciding the regular reference while the same Court is hearing matters under Section 10(1) of the said Act. The same reason will apply to the present case. In the present case, the stand of the Headmaster was that there is no alternative remedy in terms of the Act which does not have any legal basis. Therefore, W.P.No.9249 of 2004 shall stand dismissed except to the extent indicated above.

12. In the second writ petition, viz., W.P.No.37756 of 2006, the Headmaster has challenged the order dated 18.9.2006 passed by the District Educational Officer, Virudhachalam, for ordering recovery of a sum of Rs.2,68,515/-. Since the Headmaster was dismissed by order dated 12.3.2004 and since the order of this Court directed that the backwages should be paid subject to the outcome of the final hearing, the School Management requested the refund of the amount of Rs.2,68,515/- from the General Provident Fund of the petitioner and the District Educational Officer,

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Virudhachalam, recovered the said amount by stating that Rs.2,68,515/- should be given to the School Management from the General Provident Fund amount of the Headmaster and the balance amount of Rs.39,357/- should be given to the Headmaster. This was based upon the order passed by this Court in W.P.No.11196 of 2003, which is extracted above.

13. While the W.P.No.37756 of 2006 was pending for hearing, the School Management has filed writ petition being W.P.No.1469 of 2007 challenging the proceedings dated 25.01.2006 passed by the second respondent and seeking for a direction to the second respondent to act as per the proceedings of the first respondent dated 17.6.2005 wherein the Director of School Education gave a direction to the District Educational Officer stating that there was no provision by which any recovery can be made from one's pension, gratuity and Provident Fund and, therefore, the Headmaster must receive all the terminal benefits without any reduction and since the Headmaster was dismissed prospectively and since he was not reinstated in service, the question of regularising his services during the period of suspension does not arise. Basing upon the same, the District Educational Officer revised his order impugned in the earlier writ petition and passed an order dated 25.01.2006 stating that no recovery can be made from the General Provident Fund of the Headmaster and if any recovery is to be made from him, the School Management must have a contractual arrangement with the Headmaster and the Department is unable to make any recovery from the terminal benefits of the Headmaster. The School Management has challenged the said impugned order and in view of the same, these two writ petitions have to be dealt with together.

14. In the present case, the Headmaster was suspended by an order dated 03.6.2002. Since the enquiry was not completed within four months as contemplated under Section 22(3) of the Private Schools Act, he is liable to be reinstated in service without prejudice to the disciplinary action. Thereafter, the School Management failed to get prior approval under Section 22(1) of the Act and thus, he is deemed to be in service. It was only by the order of the appellate authority dated 02.3.2004, the School Management got permission to dismiss the Headmaster. Such an approval can be only prospective under the Act. The provision for prior approval under Section 22(1) of the Act is held to be mandatory and any dismissal without approval is held to be ab initio void. Therefore, whether the Headmaster has been dismissed for a misconduct or not, he is entitled to salary for the entire period from 03.6.2002 till 12.3.2004 when he was dismissed by the Management. Even if any amounts are paid, the question of recovery does not arise. Therefore, the School Management seeking for recovery of the said amount from the salary of the Headmaster

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does not arise. Rule 17 of the Private Schools Act fixes the responsibility on the School Management to pay the salary to the Teachers and only for the period of suspension they can get Government grant. The order of the learned Judge, which is extracted above, will have to be understood only in this context because the Court cannot create any right for any person nor extinguish any right if it is otherwise available under any law to any person. Therefore, when this Court in paragraph 4 of its order dated 28.8.2003 directed the payment of salary to the Headmaster by the School Management, it only reiterated the legal position that the Headmaster was liable to be reinstated in service in terms of Section 22(3)(b) of the Private Schools Act and since the School Management was resisting a physical requirement, their liability to pay the salary was made because what the Management was doing is contrary to the provisions of the Act and the Court thought that monitory compensation can be a sufficient ground to deny physical restoration.

15. The second portion found in the order in paragraph 4 has to be understood that if the School Management ultimately becomes successful in the appeal and the removal was upheld by the appellate authority, it was merely stated that it is open to the School Management to recover whatever salary paid to the petitioner from out of the benefits that has been accrued for the services rendered to the School. It has to be seen only in the context of the legal liability of the Management to recover such amount. When under the Scheme of the Act, the maximum period of four months of suspension has been prescribed under Section 22(3)(b) of the Act and when a restraint on the School Management from terminating a Teacher without prior approval as per Section 22(1) of the Act has also been made, any salary paid to the teacher is pursuant to the Private Schools Act.

16. In the present case, admittedly, the approval was refused by the approving authority, viz., Chief Educational Officer, Cuddalore and only the appellate authority granted approval and finally with that approval, the Headmaster was dismissed by an order dated 13.3.2004 and the order of dismissal has been made by the Management only prospectively, i.e., with effect from 13.3.2004 and, therefore, he is entitled for salary as if he is in employment. Therefore, the question of making any recovery from his salary does not arise and if any such recovery is ordered, that will be contrary to the Act and also the earlier order made by a Division Bench of this Court in favour of the Headmaster. Apart from the same, there is nothing wrong in the District Educational Officer, Virudhachalam, getting clarification as directed and revising his earlier order. In this case, the impugned order challenged by the School Management is perfectly in order because in law, no attachment or recovery is permissible in terms of the

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Provident Fund amount, Pension and DCRG. Therefore, the Management cannot be said to be prejudiced and the authority has merely stated that if the School Management has any contractual terms, then appropriate recoveries can be made by enforcing such contractual terms and the School Management cannot make any recovery from the terminal benefits.

17. In the light of the above legal position, W.P.No.37756 of 2006 filed by the Headmaster shall stand allowed. W.P.No.1469 of 2007 filed by the School Management shall stand dismissed. However, there will be no order as to costs. Consequently, M.P.No.1 of 2006 in W.P.No.37756 of 2006 and M.P.No.1 of 2007 in W.P.No.1469 of 2007 will also stand dismissed.

gri

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Director of School Education,
College Road, Chennai 6.

2. The Joint Director of Higher Secondary Education
DPI Campus
College Road
Chennai

3. The Chief Educational Officer
Cuddalore District

4. The District Educational Officer
District Educational Office
Virudhachalam, Cuddalore

+ 1 cc to Ms. A. L. Ganthimathi, Advocate SR No. 24821
+ 3 ccs to Mr. R. Subramanian, Advocate SR No. 25321
+ 1 cc to the Government Pleader, SR No.25200

Common Order in WP.Nos.
9249 of 2004, 37756 of 2006
and 1469 of 2007

RS(CO)
SR/13.7.2007

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